DEC 2 1 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 646

UNITED MAIL ORDER, WAREHOUSE & RETAIL EMPLOYEES UNION, LOCAL 20, affiliated with UNITED RETAIL, WHOLESALE AND DEPARTMENT STORE EMPLOYEES OF AMERICA, C. I. O. an unincorporated Association; (and) SAMUEL WOLCHOK, LEONARD LEVY, MICHAEL MANN, SANDRA G. SLOTKIN, HENRY ANDERSON, HAROLD RABE, ADOLPH LORESCH, STANLEY ALLEN, ALEX ARNDT, SALLY FASH, CAROLINE HERTEL, FRANK McGOVERN JEANNETTE BROWNFIELD, WILBUR REYNOLDS, and MYRNA SIEGENDORF, individually and as Members of said unincorporated Association,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, United Mail Order, Warehouse and Retail Employees Union, Local 20, affiliated with United Retail, Wholesale and Department Store Employees of America, C.I.O., an unincorporated Association; (and) Samuel Wolchok, Leonard Levy, Michael Mann, Sandra G. Slotkin, Henry Anderson, Harold Rabe, Adolph Loresch, Stanley Allen, Alex Arndt, Sally Fash, Caroline Hertel, Frank McGovern, Jeannette Brownfield, Wilbur Reynolds, and Myrna Siegendorf, individually and as Members of said unincorporated Association, respectfully pray for a

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Writ of Certiorari to the Supreme Court of the State of Illinois to reverse the Judgment of said Court entered on the 23rd day of May, 1956, which judgment was bottomed on the opinion of said Court, and which opinion was modified on pages 4, 8 and 9 upon Denial of Petition for rehearing on September 24, 1956. Said Judgment affirmed the decision of the Appellate Court of Illinois for the First District, filed on June 13, 1955, reversing the Judgment of the Municipal Court of Chicago in favor of the Petitioners, entered on February 23, 1954.

The Judgment of the trial court (the Municipal Court of Chicago) in favor of the Petitioners assessed their damages in the sum of $327,000.

The opinion of the Appellate Court of Illinois for the First District is reported in 128 N.E. 2d 645 (6 Ill. App. 2d 477), and that of the Supreme Court of Illinois in 137 N.E. 2d 47.

Petitioners filed a Petition for rehearing in the Supreme Court of Illinois on June 11, 1956, which Petition was denied on September 24, 1956; however the opinion was modified on pages 4, 8 and 9 thereof in certain particulars.

JURISDICTION.

Jurisdiction of the Court is invoked under Title 28 U.S.C.A. Section 1257(3). The judgment of the Supreme Court of Illinois to be reviewed was filed on May 23, 1956. Petitioners' request for a rehearing filed in said Supreme Court of Illinois was denied on September 24, 1956.

Petitioners raised the Federal Constitutional issues before the Supreme Court of Illinois and particularly raised their reliance on Article I, Sec. 10, Cl. 1, as to the impairment of obligation of contract and upon the Fourteenth Amendment to the Constitution of the United States pertaining to due process.

QUESTIONS PRESENTED.

Did the State of Illinois deprive Petitioners of due process of law in that:

(a) *While both the Illinois Appellate Court* (330 Ill. App. 49) *and the Supreme Court of Illinois* (400 Ill. 38) *reversed the injunctional decrees of the Superior Court of Cook County of June 25, 1945 and July 6, 1945, and remanded the cause with directions to dismiss Respondent's complaint for want of equity, holding now that the final order of July 6, 1945, although issued inequitably, nevertheless, remains valid and makes a temporary injunction, —issued similarly inequitably,—into a permanent one.*

(b) *While both the Illinois Appellate Court* (330 Ill. App. 49) *and the Supreme Court of Illinois* (400 Ill. 38) *formerly held that the issuance of the injunctional decrees of June 25, 1945 and July 6, 1945 were wanting in equity, nevertheless now hold that the inequitably issued order of July 6, 1945, and without Petitioners having had their day in court, determined the issues on the merits, even though the issues were raised by a complaint that was ordered dismissed for want of equity.*

(c) *While the temporary injunction of June 25, 1945 effectively restrained Petitioners from that date on until November 28, 1946, when the Illinois Appellate Court reversed said temporary injunction and also reversed the final decree of July 6, 1945, and ordered the complaint to be dismissed for want of equity, nevertheless the present holding of the Supreme Court of Illinois deprives Petitioners of all damages suffered by them because of the injunction. The rationale of such holding is that the two inequitably issued decrees of the Superior Court of Cook County merged.*

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(d) *While the prior holdings of the Appellate Court of Illinois* (330 Ill. App. 49) *and the Supreme Court of Illinois* (400 Ill. 38) *found that the decrees of the Superior Court of Cook County of June 25, 1945 and July 6, 1945 were wanting in equity, nevertheless because of their merging into each other they thereby nullify the Injunction Statute of Illinois* (Ill. Rev. Stat., Ch. 69, Section 12) *and deprived Petitioners from recovering thereunder their damages suffered because of the wrongful injunction.*

(e) *While the Appellate Court of Illinois in its opinion of June 13, 1955* (128 N.E. 2d 645) *holds that because of the prior holding of that Court* (330 Ill. App. 49) *and of the Supreme Court of Illinois* (400 Ill. 38) *Respondent's "complaint was inherently defective and did not support the injunctional relief sought upon Constitutional and jurisdictional grant, it would be naive to hold that the temporary injunction was rightfully issued", the Supreme Court of Illinois in its opinion of May 23, 1956, to the contrary finds that "the record affirmatively shows that the temporary injunction was not dissolved prior to the entry of the final order on the merits of the case, but was merged therein", and further finds that Petitioners "failed to establish any breach of condition of the bond or any right to recover thereon."*

(f) *The State of Illinois by the decision of the Supreme Court of Illinois of May 23, 1956, effectively passed a law impairing the obligation of a contract entered into by and between the Respondent and Petitioners pursuant to the intent of the injunction bond. This contract by its intent and purport of the Injunction Statute* (Ill. Rev. Stat. 1947, Ch. 69, Sec. 12) *bound the Respondent to pay to Petitioners all their damages which they may suffer because of the wrongful issuance of the temporary injunc-*

tion; nevertheless, the Supreme Court of Illinois held that Respondent was not bound to pay such damages at all. This holding of the Supreme Court of Illinois is contrary to its prior holding that Respondent's complaint was wanting in equity and ordered the dismissal of the same. (400 Ill. 38)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provisions involved are as follows:

> "No state shall . . . pass any law impairing the obligation of contract. . . . ." Art. I, Sec. 10, Cl. 1.
>
> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, "or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Amendment XIV.

The statutory provision involved is as follows:

> "In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain to the party damnified by such injunction, and may award execution to collect the same: *Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond.*" (Illinois Revised Statutes, Ch. 69, Section 12.)

STATEMENT OF THE CASE.

Petitioners filed a first class suit in contract in the Municipal Court of Chicago against Respondent on a $1,000 injunction bond theretofore filed by Respondent in the Superior Court of Cook County, to recover damages suffered by Petitioners because of the wrongful issuance of an injunction from said Superior Court of Cook County on June 25, 1945 (A. 1 to 7). Petitioners recovered Judgment against Respondent in the Municipal Court of Cook County in the sum of $327,000, together with costs. Said Judgment included $77,000 attorneys' fees, for which Judgment execution was issued on February 23, 1954 (A. 23). Respondent appealed from the Judgment of the Municipal Court of Chicago to the Appellate Court of Illinois for the First District, which Court reversed the Judgment of the Municipal Court of Chicago (A. 369, 370).

Petitioners filed to the September Term, A. D. 1955 their Petition for Leave to Appeal to the Supreme Court of Illinois, which Court granted leave to appeal after overruling Respondent's motion to dismiss the Petition for lack of jurisdiction of said Court.

The bond on which said suit was filed by Petitioners in the Municipal Court of Chicago was given by Respondent in a certain injunction suit filed in the Superior Court of Cook County, the pertinent matters transpiring in said Superior Court of Cook County are described in the opinion of the Appellate Court of Illinois (128 N.E. 2d 645):

> "The original complaint filed by Ward's on November 9, 1943 alleged that plaintiffs (who were defendants in that proceeding and will hereinafter be referred to as the union) had conspired to libel and vilify Ward's for the purpose of injuring its business

and reputation. The complaint prayed for a temporary and permanent injunction against continued publication of libelous statements, and asked for monetary damages in the amount of $1,000,000.00 for past libels. The union filed a motion to strike Ward's complaint and dismiss the suit, whereupon Ward's moved for a preliminary injunction. Both motions were fully argued and briefed, and thereafter, on June 25, 1945, the chancellor entered an order denying the union's motion to dismiss the action. On the same day he granted Ward's motion for a preliminary injunction, to be effective upon the approval of an injunction bond, and to remain in effect until further order of court. The temporary injunction prohibited the union and designated union members from conspiring together or acting in concert to publish untrue statements concerning Ward's for the purpose of causing its employees and customers to fear, dislike or distrust Ward's, its officers or supervisory employees. On the following day, June 26, 1945, the injunction bond sued upon in this proceeding, in the amount of $1,000.00, was filed and approved.

"Some ten days later, on July 6, 1945, the union filed a motion to vacate and set aside the order of June 25, 1945 which denied its motion to dismiss, and which granted Ward's motion for a preliminary injunction. The court denied the union's motion, and since it refused to plead further and stated orally that it would stand on its motion to strike the complaint and dismiss the suit, the court on that day entered an order which reads

"in part as follows: '* * * the above-named defendants having elected to stand on their Motion to Strike the complaint and to dismiss the suit, therefore the Order of June 25, 1945 is made a final order.' The union appealed from the order of June 25, 1945 and the final order of July 6, 1945, and on November 20, 1946 the third division of this court, in *Montgomery Ward & Co.* v. *United, etc., Employees,* 330 Ill. App. 49, reversed the decrees of June 25, 1945 and July

6, 1945 and remanded the cause 'with directions to dismiss the compiaint for want of equity.' Ward's then appealed to the Supreme Court of Illinois, which on March 18, 1948 affirmed the judgment of the Appellate Court (*Montgomery Ward & United Employees,* 400 Ill. 38)."

The injunction bond filed and approved on June 26, 1945, upon which the judgment for damages was obtained reads as follows:

"Know all Men by These Presents,

"That we, Montgomery Ward & Co., Incorporated, as principal, and Seaboard Surety Company, as surety, of the County of Cook and State of Illinois, are held and firmly bound unto (the defendants in the injunction suit), in the sum of One Thousand and no/100th Dollars ($1,000.00) to be paid to the said Defendants, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

"Sealed with our Seals, and dated this 26th day of June, A. D. 1945.

"Whereas, the above bounden Montgomery Ward & Co., Incorporated has filed its bill of complaint in the Superior Court of Cook County and State of Illinois against the above named defendants praying, among other things, for an injunction to restrain the above named defendants from

(1) conspiring together to publish, or to cause to be published, or to assist or encourage any other person or organization to publish, untrue statements concerning the plaintiff, its officers, or its super-

visory employees, or concerning the working conditions maintained by the plaintiff, for the purpose of

(a) causing plaintiff's employees to fear, dislike to distrust the plaintiff or plaintiff's officers or supervisory employees, or

(b) causing prospective employees to fear, dislike, or distrust the plaintiff, or plaintiff's officers or supervisory employees, or

(c) causing plaintiff's customers or prospective customers to dislike or distrust the plaintiff, or plaintiff's officers or supervisory employees;

(2) from acting in concert to publish, or to cause to be published, or to assist or encourage any other person or organization to publish, untrue statements, concerning the plaintiff, its officers, or its supervisory employees, or concerning the working conditions maintained by the plaintiff, which untrue statements have the effect of

(a) causing plaintiff's employees to fear, dislike, or distrust the plaintiff, or plaintiff's officers or supervisory employees; or

(b) causing prospective employees to fear, dislike, or distrust the plaintiff, or plaintiff's officers or supervisory employees; or

(c) causing plaintiff's customers or prospective customers to dislike or distrust the plaintiff, or plaintiff's officers or supervisory employees.

"And whereas said Court has allowed an injunction for that purpose according to the prayer of said bill, upon the said Montgomery Ward & Co., Incorporated giving bond and security as provided by law:

"Now, therefore, the condition of the above obligation is such that if the above bounden Montgomery Ward & Co., Incorporated, and Seabord Surety Company, their executors or administrators, or any of

> them, shall and do well and truly pay, or cause to be paid to the said Defendants, their executors, administrators or assigns, all damages which may be sustained by the said defendants, or any one or more of them by reason of the wrongful issuing of such injunction, and also, all such costs and damages as shall be awarded against the said complainant, 'Montgomery Ward & Co., Incorporated, in case the said injunction shall be dissolved; then, the above obligation to be void; otherwise to be and remain in full force and virtue." (Ab. 32-34)

Respondent, in its appeal to the Appellate Court of Illinois from the adverse judgment in the sum of $327,000 entered in the Municipal Court of Chicago, raised a number of questions; however, said Appellate Court (128 N.E. 2d 645) decided the issues in favor of Respondent on the ground that:

(1) That the temporary injunction was effective only from June 24, 1945 to July 6, 1945, when it became *functus officio* by reason of the final order.

(2) Said Appellate Court also decided that even though the selfsame Court reversed both the Judgments of June 25, 1945 and July 6, 1945 upon the appeal of Petitioners' on November 20, 1945 (330 Ill. App. 49); nevertheless, the temporary injunction issued on June 25, 1945 was in effect only for eleven (11) days and that accordingly Petitioners would be entitled to damages for only that eleven (11) day period.

(3) Said Appellate Court also limited the Petitioners' recovery to $1,000, the penal sum named in the injunction bond.

(4) Said Appellate Court also ruled adversely to Petitioners on the ground that one of the Petitioners is a union, an unincorporated association without legal capacity to sue in its own name.

Petitioners, on appeal to the Supreme Court of Illinois assigned four propositions as error for reversal of the Appellate Court decision, as follows:

> "1. The stated penalty in an injunction bond does not limit the amount of damages recoverable in an action on the bond from the principal therein.
>
> "2. The temporary injunction of June 25, 1945, did not become *functus officio* by reason of the final order of July 6, 1945, in the original suit and such final order did not turn the temporary injunction into a permanent injunction.
>
> "3. The Union is not barred from suing Wards on Ward's injunction bond as an unincorporated association.
>
> "4. The trial court entered a separate and distinct judgment for attorneys' fees in this case and the Appellate Court erred in ignoring the question of attorneys' fees."

On the first proposition of error, the Supreme Court of Illinois (137 N.E. 2d 47) stated that

> "'the Appellate Court correctly held that Wards'' (respondent herein) 'liability in the contract action by the Union' (Petitioners herein) 'on the injunction bond was limited by the extent of its promise and could not in any case, exceed $1,000.'"

The Supreme Court then further stated that

> "'The question remains as to what damages, if any, the Union' (Petitioners herein) 'is entitled to for issuance of the temporary injuiction, within the limits of the penalty of the bond, inasmuch as section 12 of the Injunction Act' (of Illinois, Ill. Rev. Stat., Ch. 69, Sec. 12) 'specifically provides that a failure to assess damages thereunder does not operate as a bar to an action upon the bond.'"

On this proposition the Supreme Court of Illinois held that in the case before the Superior Court of Cook County where Respondent filed its complaint for a temporary and permanent injunction and for monetary damages in the amount of $1,000,000, for past libels, the final order of July 6, 1945, made the temporary injunction perpetual because Petitioners' motion to dissolve the temporary injunction was overruled and they elected to stand on their motion to dismiss the complaint on constitutional grounds and for want of equity. The Supreme Court held that Petitioners' motion to dismiss was equivalent to a demurrer at common law, and since they refused to plead further

> "'Therefore the trial court, from a procedural point of view, properly entered its final order making the temporary injunction permanent, that being the then existing law of the case, even though upon appeal through the Appellate Court to this court it was finally determined that the trial court' (*i.e.* Superior Court of Cook County which issued the temporary injunction of June 25, 1945 and the final order of July 6, 1945) 'was in error as to the right of Wards' (*i.e.* Respondent) 'to a permanent injunction.'"

The Supreme Court further held on this point that

> "'When the Union' (*i.e.* Petitioners) 'elected to stand on its' (their) 'motion to strike the original complaint and to dismiss the suit for want of equity . . . the decision of the trial court was given on the merits of the controversy and on the question whether a permanent injunction should issue under the facts alleged in the complaint and admitted by the Union's' (Petitioners) 'motion to dismiss. Upon the entry of such final order the temporary injunction previously issued was not dissolved but merged in the permanent injunction.'"

The Supreme Court further held that

> "Since the temporary injunction in this case was not dissolved before a determination on the merits, and since it merged with the permanent injunction issued by the trial court, damages were not assessable under section 12 of the Injunction Act * * *"

The Supreme Court of Illinois reasoned that

> "'In order to recover on the bond here in issue the Union' (Petitioners) (were) 'was required to establish the breach of conditions of the bond, that is, the Union' (Petitioners) 'had to show that the temporary injunction had been wrongfully issued and that it is dissolved. Since the record affirmatively shows that the temporary injunction was not dissolved prior to the entry of final order on the merits of the case but was merged therein, the Union' (Petitioners) 'failed to establish any breach of condition of the bond or any right to recover thereon.'"

The above reasoning of the Supreme Court is juxtaposed to the finding of the Appellate Court of Illinois as set forth in its opinion (128 N.E. 2d 645):

> "'Since the first opinion of this Court (330 Ill. App. 49) and that of the Supreme Court (400 Ill. 38) both hold conclusively that Ward's' (Respondent) 'complaint was inherently defective and did not support the injunctive relief sought upon Constitutional and jurisdictional grants, it would be naive to hold that the temporary injunction was rightfully issued.'"

Petitioners file this, their petition for a writ of certiorari to the Supreme Court of the State of Illinois so that said judgment of said Court may be reviewed by this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioners' case raises important questions of Constitutional Law which as far as we know have not been but should be settled by this Court:

I.

A temporary injunction issued by the chancellor upon the allegations of a complaint, which complaint was ordered by the State Appellate Court to be dismissed on constitutional grounds and for want of equity, is of no legal effect whatsoever, and any effect given to it is contrary to due process.

Constitution of the State of Illinois, Article II, par. 2.

Constitution of the United States, Amendment 14.

Hurtado v. *California,* 110 U.S. 516 (1884).

Ill. Rev. Stat. 1947, Ch. 69, Sec. 12.

II.

An order entitled final that is entered by the chancellor after overruling defendants' motion to vacate the temporary injunction theretofore entered and to dismiss the complaint on constitutional grounds and for want of equity becomes a nullity when the State Appellate Court reverses both the temporary injunction and final order and orders the dismissal of the complaint on constitutional grounds and for want of equity. Giving any effect thereafter to such final order is contrary to due process.

Constitution of the State of Illinois, Article II, par. 2.

Constitution of the United States, Amendment 14.

Hurtado v. *California,* 110 U.S. 516 (1884).

Ill. Rev. Stat. 1947, Ch. 69, Sec. 12.

III.

The entry in equity of an order entitled "Final" which is entered without hearing the issues and solely on the ground that the defendants stood by their motion to dismiss the complaint on constitutional grounds becomes a nullity for all purposes upon the State Appellate Court reversing such final order and remanding the cause to be dismissed for want of equity. To give any effect to such "Final" order and particularly to give it the effect making the temporary injunction which was also reversed a permanent one is contrary to due process because the defendants had no opportunity to be heard before the alleged final judgment is entered.

Constitution of the State of Illinois, Article II, par. 2.

Constitution of the United States, Amendment 14.

Hurtado v. *California*, 110 U.S. 516 (1884).

Ill. Rev. Stat. 1947, Ch. 69, Sec. 12.

Postal Telegraph Co. v. *Newport*, 247 U.S. 464 (1918).

Baker v. *Baker & Co.*, 242 U.S. 394 (1917).

Louisville & N. R. Co. v. *Schmidt*, 177 U.S. 230 (1900).

IV.

The Illinois Injunction Act vests in the aggrieved party against whom a temporary injunction wrongfully issues the right to recover his damages suffered in consequence. The taking away of such right by a state court is contrary to due process.

Constitution of the State of Illinois, Article II, par. 2.

Constitution of the United States, Amendment 14.

Hurtado v. *California*, 110 U.S. 516 (1884).

Ill. Rev. Stat. 1947, Ch. 69, Sec. 12.

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V.

The Illinois Injunction Act provides that before an injunction issues the complainant shall give bond. It further provides that where an injunction is dissolved, the Chancellor shall assess such damages as the nature of the case may require and to equity appertain. The denial by a state court of the right of the aggrieved party to recover his damages on any ground, is contrary to equity and to due process.

Constitution of the State of Illinois, Article II, par. 2.

Constitution of the United States, Amendment 14.

Hurtado v. *California,* 110 U.S. 516 (1884).

Ill. Rev. Stat., Ch. 69, Section 12.

VI.

When a temporary injunction issues and upon the defendant's standing on its motion to dismiss on constitutional grounds a final order is entered and the reviewing court reverses both orders and orders the complaint to be dismissed for want of equity, the basis of the injunction disappears and it is dissolved by operation of law and thereby the statutory right of the aggrieved party to recover his damages arises. The denial to recover such damages is contrary to equity and contrary to due process.

Constitution of the State of Illinois, Article II, par. 2.

Constitution of the United States, Amendment 14.

Hurtado v. *California,* 110 U.S. 516 (1884).

Ill. Rev. Stat., Ch. 69, Section 12.

VII.

A bond given by a plaintiff in equity who is asking for a temporary injunction does so pursuant to the injunctions statute. The law at the time of the execution of the bond is a part of it; it is as much a part of the bond as if in *terms incorporated therein. The disregard of the law as it is incorporated in the injunction statute is lack of due process.*

Ill. Rev. Stat., Ch. 69, Sections 8, 9, 11, 12 and 15.

Mix v. *Vail*, 68 Ill. 40.

VIII.

The equitable purpose of an injunction bond is to indemnify the party who is restrained by the injunction for all damages that he may suffer because of the wrongful issuance of the injunction. The undertaking that complainant enters into is incorporated into a contract based on a valid consideration. An interpretation given by the state court that is contrary to such basic concept underlying the contract incorporated in the bond effectively impairs the obligation of the contract contrary to the Constitution of the State of Illinois and the Constitution of the United States.

Charles River Bridge v. *Warren Bridge*, 11 Peters 420 (1837).

Dartmouth College v. *Woodward*, 4 Wheaton 518 (1819).

Ill. Rev. Stat. 1947, Ch. 69, Section 12.

Constitution of the State of Illinois, Art. II, par. 14.

Constitution of the United States, Art. 1, Sec. 10, Cl. 1.

This Court has never decided the important question of due process, both substantive and procedural, as this question is raised by petitioners herein.

This Court has never decided the question as to the impairment of a contract bottomed on a State Statute which as we submit was totally disregarded by the Supreme Court of Illinois and thus impaired the contract embodied in the injunction bond and in the underlying Illinois Statute.

This Court has never decided how far the concept of due process is controlling as far as state courts are concerned in injunction cases and how much of a protection the concept of due process gives to litigants in state courts when their contractual rights are to be scrutinized. We hopefully expect that this Court will intervene so that this case may be heard for the purpose that a definite answer may be given by this Court as to these issues.

ARGUMENT.

For a clearer understanding of the issues it seems necessary to review succinctly the long history of the litigation. The foundations of this "Heartbreak House" were laid on November 9, 1943, when respondents filed their suit in equity in the Superior Court of Cook County. The complaint alleged that the respondent was an Illinois corporation employing thousands of workers in Chicago who were substantially all members of the United Mail Order, Warehouse and Retail Employees Union, Local 20 (hereinafter referred to as the Union, one of the petitioners herein). The complaint charged that the Union and its members, particularly those who are named as petitioners herein, were guilty of acts of conspiracy and libel against respondent, who prayed for both a temporary and permanent injunction against petitioners and also an award of damages to them in the amount of $1,000,000. (Ab. 2).

Petitioners promptly filed, on November 30, 1943, their motion to dismiss the complaint on Constitutional grounds and for want of equity. (Ab. 2).

Respondent filed a motion for temporary injunction on December 7, 1943, which motion was promptly heard by the Chancellor who asked for briefing of the issues (Ab. 2, Opinion of the Appellate Court, June 13, 1955. The motion was held under advisement by the Chancellor for about 18½ months, that is, from December 7, 1943 to June 25, 1945 (Ab. 2). On the latter date the Chancellor denied petitioners' motion to strike the complaint and to dismiss the suit, and granted respondent's motion for a temporary injunction upon respondent's filing an injunction bond in the nature of a cost bond in the amount of

$1,000. (Ab. 2 and 3). The temporary injunction restrained petitioners from conspiring together or acting in concert to publish or to assist or encourage others to publish untrue statements concerning the respondent for the purpose of causing its employees, prospective employees, or customers to fear, dislike, or distrust respondent or its officers or supervisory employees. (Ab. 3).

On June 26, 1945 respondent, as principal, and Seaboard Surety Company, as surety, executed an injunction bond which was approved by the Chancellor and filed with the clerk. The provisions of the injunction bond are quoted in our Statement of the Case. On the day of the filing of the bond, a Writ of Injunction was issued and served upon petitioners (Ab. 3).

On July 6, 1945 petitioners presented before the Chancellor a motion to dissolve and vacate the temporary injunction granted on June 25, 1945, and again asked the court to strike the complaint and dismiss the suit. These motions were denied by the Chancellor who entered an order entitled "Final" reciting that inasmuch as petitioners "having elected to stand on their motion to strike the complaint and to dismiss the suit, therefore order of June 25, 1945 is made a final order." (Ab. 36).

Petitioners appealed to the Appellate Court of Illinois which court, on November 24, 1946, reversed the Chancellor's orders of June 25, 1945 and of July 6, 1945 and remanded the case to the Superior Court with directions to dismiss the complaint for want of equity. (Ab. 4). Respondent then appealed to the Supreme Court of Illinois and that court, on March 18, 1948, entered its judgment affirming the judgment of the Appellate Court of Illinois reversing the orders of June 25, 1945 and July 6, 1945 and

directing the dismissal of the complaint for want of equity. (Ab. 4).

Prior to the issuance of the temporary injunction on June 25, 1945, counsel for the Union, who also represented the other petitioners, requested the Chancellor that the injunction bond should be in an amount not less than $2,000,000. Counsel for respondent desired to avoid "quibbling" and suggested a bond of $50,000 or $100,000; however, the Chancellor expressed an opinion that respondent is good for any amount of damages that petitioners might be able to establish if the injunction should be dissolved, and therefore he set a cost bond in the amount of $1,000. (Ab. 69, 353; Record 3247-3259).

The filing of the suit on November 9, 1945 took place in the midst of a violent labor controversy that began earlier between the Union and respondent. The controversy involved the National Labor Relations Board, the War Labor Board, the President and the Army of the United States (Ab. 118 to 130). The effect of the lawsuit was that the Union members and the officers thereof became extremely frightened because of the possibility of $1,000,000 in damages being assessed against them. (Ab. 128). Union members dropped out in droves and the membership decreased during the pendency of the lawsuit from about 4,000 to less than 100. (Ab. 206, 364, 365, 368).

The issues involved in the lawsuit appeared to be of importance to other Labor Unions who supported the Union financially, (Ab. 107), and so did the parent organization of the Union (Ab. 131 to 216, 219 and 222).

The Union, to maintain its organizational setup in face of the damaging effect of respondent's suit, filed on November 9, 1943, expended hundred of thousands of dollars

to offset the effect of respondent's lawsuit (Ab. 217, 131 and 216).

The Supreme Court of Illinois finally determined on May 18, 1948 that the two orders entered by the Chancellor on June 25, 1945 and July 6, 1945 were to be reversed on Constitutional grounds, as contended for by the petitioners from the beginning, and ordered that the complaint be dismissed for want of equity. (400 Ill. 38). This judgment of the Supreme Court of Illinois affirmed the judgment of the Appellate Court of Illinois on November 24, 1946 (330 Ill. App. 49). By the time, however, when the Supreme Court of Illinois spoke in favor of petitioners, the effect of the lawsuit and particularly of the temporary injunction that was wrongfully issued on June 25, 1945, effectively destroyed the Union. (Ab. 206, 223, 261 and 262).

Petitioners filed their statement of claim in the Municipal Court of Chicago on May 30, 1953. It was filed as a contract claim on the injunction bond (Ab. 1 and 2). The complaint alleged *inter alia* that by reason of the judgments of the Appellate and Supreme Courts of Illinois (330 Ill. App. 49 and 400 Ill. 38), the temporary injunction was wrongfully issued and was not dissolved until the Supreme Court of Illinois spoke on March 18, 1948, and that the complaint was wrongfully filed, and the consequence of it was that petitioners suffered damages consisting of loss of membership and further consisting of the total loss of economic and moral strength of the Union as a bargaining agent. The Union attempt to offset the damage done by respondent filing the suit and done by the wrongful issuance of the injunction was of no avail, even though hundreds of thousands of dollars were expended by the Union. The Union came out of the litigation legally successful, but factually destroyed. (Ab. 4 and 5).

The damages claimed by the Union in the bond suit amounted to $800,000, which sum included attorneys' fees, which the petitioners obligated themselves to pay in connection with their legal battle. (Ab. 5 and 6).

Respondents filed their motion to strike and dismiss petitioners' statement of claim in the Municipal Court of Chicago, which motion to strike and dismiss was denied by said court (Ab. 7 to 20) and the cause was ordered to trial without a jury.

On February 23, 1954, the trial court found the issues against respondent and assessed petitioners' damages in the sum of $327,000, together with costs. Judgment was entered in that amount which included $77,000 attorneys' fees. (Ab. 23) Respondents filed their motion of appeal to the Appellate Court of the State of Illinois, which court on June 13, 1955 reversed the judgment of the Municipal Court of Chicago (Ab. 23, 369 and 370).

Petitioners filed their petition for leave to appeal to the Supreme Court of Illinois which was granted. That court upheld the Appellate Court of Illinois in its opinion hereto attached as Appendix A.

I.

A temporary injunction issued by the chancellor upon the allegations of a complaint, which complaint was ordered by the State Appellate Court to be dismissed on constitutional grounds and for want of equity, is of no legal effect whatsoever, and any effect given to it is contrary to due process.

Petitioners' appeal from the Chancellor's orders of June 25, 1945 and from the order of July 6, 1946, resulted in a

judgment by the Appellate Court of Illinois, dated November 24, 1945, which judgment reversed *both* orders and remanded the cause with directions "to dismiss the complaint for want of equity." (300 Ill. App. 49) Respondent's leave to appeal to the Supreme Court of Illinois was granted and its appeal was terminated on May 18, 1948, on which date the Supreme Court of Illinois upheld the Appellate Court (400 Ill. 38).

We submit that when the Review Courts of Illinois unambiguously stated that the Chancellor, because of the Constitutional issues involved, had no *jurisdiction* to grant the temporary injnction, and when those Reviewing Courts ordered the complaint to be dismissed for want of equity, the Chancellor's orders of June 25, and July 6, 1945 became a nullity *ab initio*. The two orders were of no legal effect and the temporary injunction was, under any and all interpretation of legal or just common sense language, wrongfully issued. In the words of the Appellate Court of Illinois' opinion of June 13, 1945:

> "since the first opinion of this Court and that of the Supreme Court both hold conclusively that Ward's complaint was inherently defective and did not support the injunctive relief sought upon Constitutional and jurisdictional grounds, it would be naive to hold that the temporary injnction was rightfully issued."

We are hopeful that this Court will agree with us and will hold that the temporary injunction was not only not rightfully, but to the contrary, it was wrongfully issued. We expect that this Court will be unable, as we are, to understand the reasoning of the Supreme Court of Illinois when it concludes that:

> "The record affirmatively shows that the temporary injunction was not dissolved prior to the entry of the

final order on the merits of the case but was merged therein." Opinion of the Supreme Court of Illinois, Appendix A).

As we understand the law, a temporary injunction is bottomed on the allegations of a complaint, and if the allegations fail to state a cause of action, and if, as the Appellate Court of Illinois held, the suit is wanting in equity, then the foundation from which the temporary injunction issues melts away and with it the temporary injunction disappears. It dissolves by operation of law irrespective of the presence or absence of a formal order to that effect. The Supreme Court's interpretation of the issues here is contrary to common sense, to legal precedents, and flies in the face of the due process clause.

Justice Mathews, speaking for the Court in *Hurtado* v. *California*, 110 U.S. 516 (1884) said that

> "arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

Petitioners, in filing their suit on the injunction bond in the Municipal Court of Chicago did, of course, as they

had the lawful right to do, rely on the intent of the Illinois legislative body which gave them as parties aggrieved by a wrongfully issued injunction, the right to recover their damages suffered in consequence thereof. The Injunction Statute (Ill. Rev. Stat. 1947, Ch. 69), leaves not doubt that petitioners had the right to recover their damages because the Statute provides in Sec. 8 thereof that:

> "before an injunction shall issue to enjoin a judgment, the complainant shall give bond to the plaintiff therein, in double the amount of such judgment, with sufficient surety approved by the court, judge or master, conditioned for the payment of all moneys and costs due to the plaintiff in the judgment, and such damages as may be awarded against the complainant in case the injunction is dissolved. *If the injunction be dissolved in the whole or in part, the complainant shall pay, exclusive of legal interest and costs, such damages as the court shall award, not exceeding ten per centum, on such parts as may be released from the injunction.*" (Emphasis supplied)

Section 9 of the Injunction Statute of Illinois states:

> "In all other cases, before an injunction shall issue, the complainant shall give bond in such penalty, and upon such condition and with such security as may be required by the court, judge or master granting or ordering the injunction: Provided, bond need not be required when, for good cause shown, the court, judge or master is of opinion that the injunction ought to be granted without bond."

Section 12 of the Injunction Statute of Illinois makes it clear what is the purpose of an injunction bond.

> "In all cases where an injunction is dissolved by any court of chancery in this state, *the court*, after dissolving such injunction, and before finally dispos-

ing of the suit, *upon the party claiming damages by reason of such injunction* suggesting, in writing, the nature and amount thereof, *shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain,* to the party damnified by such injunction, and may *award execution to collect the same*: Provided, a *failure so to assess damages shall not operate as a bar to an action upon the injunction bond.*" (Emphasis supplied)

Reading Sections 8, 9 and 12 of the Injunction Statute of Illinois, it becomes clear beyond peradventure of doubt that a party aggrieved by the wrongful issuance of an injunction may suggest to the Chancellor the amount of the damages suffered by him because of the injunction, and if such suggestion is made, then the Chancellor "*shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction.*"

The statute does not say that the Illinois Courts, whether sitting in chancery or sitting as in review, may if they so desire assess the damages. The statute says that they *shall* assess such damages as to equity appertain.

Section 12 of the Injunction Statute has a provision attached to it which says that "*a failure so to assess damages shall not operate as a bar to an action upon the injunction bond.*"

Here again the Statute is clear, and since the proviso is attached to the preceding part of Section 12 of the Statute, the two must be read together, and thus it becomes mandatory that *in a suit on the injunction bond, evidence must be heard and such damages are to be assessed "as the nature of the case may require, and to equity appertain.*"

We believe that the Illinois Review Courts, and particularly the Supreme Court of Illinois, deprived petitioners of due process under the Constitution of the State of Illinois and the Constitution of the United States when it disregarded the clear mandate of the Illinois Injunction Statute. Such holding by the two Illinois Appeal Courts was a grievous error which ought to be righted by this Court, granting a Writ of Certiorari and upon the full hearing of this cause, reversing the judgment of the Supreme Court of Illinois.

II.

An order entitled final that is entered by the chancellor after overruling defendants' motion to vacate the temporary injunction theretofore entered and to dismiss the complaint on constitutional grounds and for want of equity becomes a nullity when the State Appellate Court reverses both the temporary injunction and final order and orders the dismissal of the complaint on constitutional grounds and for want of equity. Giving any effect thereafter to such final order is contrary to due process.

As we argued under point I above, the decisions of the Illinois Appellate Court and the Supreme Court of Illinois (330 Ill. App. 49 and 400 Ill. 38), resulted in the nullification of the Chancellor's orders of June 25, 1945 and June 6, 1945; nevertheless, now the Supreme Court of Illinois holds that the two orders so nullified because they were inequitably issued, merged into each other and by such matrimony the nullified orders were legally revived, and after rising from the dead stand in petitioners' path to recover such damages as the Illinois Injunction Act (Ill. Rev. Stat. 1947, Chapt. 69, Sec. 12) says they are entitled to have.

We submit that if the decision of the Supreme Court of Illinois is permitted to stand, then the procedural rules

of that State become a web entangling not only the unwary but also those who, while aware of the danger, are nevertheless unable to avoid the pitfalls. The decision of the Supreme Court of Illinois in effect says "Now you see it, now you don't". First you see that the temporary injunction issued contrary to the Constitution is wrongful (330 Ill. App. 49 and 400 Ill. 38), at other times, however, the selfsame injunction so wrongfully issued becomes a stone wall, separating the aggrieved party from a recovery of his damages even though the Injunction Statute says that he ought to receive assessment therefor, and that the court "award execution to collect the same." (Ill. Rev. Stat. 1947, Chapt. 69, Sec. 12)

The interpretation embodied in the Opinion of the Supreme Court of Illinois is a clear violation of the Constitution of the State of Illinois, Art. II, par. 2, and the Constitution of the United States, Amendment 14, as they pertain to due process.

III.

The entry in equity of an order entitled "Final" which is entered without hearing the issues and solely on the ground that the defendants stood by their motion to dismiss the complaint on constitutional grounds becomes a nullity for all purposes upon the State Appellate Court reversing such final order and remanding the cause to be dismissed for want of equity. To give any effect to such "Final" order and particularly to give it the effect of making the temporary injunction which was also reversed a permanent one is contrary to due process because the defendants had no opportunity to be heard before the alleged final judgment is entered.

The Illinois Injunction Act (Ill. Rev. Stat. 1947, Ch. 69) in Section 14 states:

> "A defendant may move to dissolve or modify an injunction in vacation, either for want of equity in the bill or upon the coming in of the answer, and the judge of the court from which the injunction was issued may hear and determine the motion upon five days' notice of the hearing having been given to the complainant or his solicitor."

The same Statute in Section 15 states as follows:

> "A motion to dissolve an injunction may be made at any time upon answer, or for want of equity on the face of the bill."

Under that Statute the petitioners had the right to ask the Chancellor to dissolve the temporary injunction that was, as it now appears from the subsequent decisions of the Reviewing Court, wrongfully issued on June 25, 1945. They had the right, if they were convinced that the Statute protected them against the effect of a wrongfully issued injunction, to stand on their motion to dismiss. They stood on their motion not audaciously nor in defiance of the law, but to the contrary, because they believed in the wisdom of the Constitution and believed that the Constitution was going to protect them and would remedy whatever wrong might have been done against them. There is no law nor equitable rule which would permit petitioners being punished because of their willingness to rely on constitutional protection. If any other approach is followed, such is contrary to due process. We submit that the Supreme Court of Illinois erred when it took this other approach and stated on page 8 of its Opinion that:

> "In the instant case the final order making the temporary injunction perpetual was entered not only after the motion of the Union to dissolve was overruled but after the Union had elected to stand on its motion to dismiss the complaint for want of equity, which

was equivalent to a demurrer at common law, and refused to plead further. Therefore *the trial court, from a procedural point of view, properly entered its final order making the temporary injunction permanent,* that being the then existing law of the case, *even though upon appeal through the Appellate Court to this court it was finally determined that the trial court was in error as to the right of Wards to a permanent injunction.*" (Emphasis ours)

The Supreme Court of Illinois erred because by some legerdemain it took a so-called final order that was reversed by it previously and grafted it upon a temporary injunction that was also reversed, and made out of two inanimate orders an animated and effective legal order. This action of the Supreme Court of Illinois is contrary to due process.

The Supreme Court of Illinois did, or attempted to do, more than that. It resolved the issues which were before the Chancellor without giving petitioners their day in court. The issue was whether respondent is entitled to a permanent injunction. Te determine the question, the issues were to be tried. Petitioners' opportunity to be heard at some time before the final judgment is entered, is taken away from them unless this Court grants their petition for a Writ of Certiorari and reverses the decision of the Supreme Court of Illinois brought before the Bar of this Court.

Postal Telegraph Co. v. *Newport*, 247 U.S. 464 (1918).

Baker v. *Baker & Co.*, 242 U.S. 394 (1917).

Louisville & N. R. Co. v. *Schmidt*, 177 U.S. 230 (1900).

This Court examined the point now raised by petitioners, and the cases cited above held that consistently with the

due process clause, a State may not enforce a judgment against a party named in the proceeding without an opportunity to be heard at some time before final judgment is entered. Because of the above decisions of this court, and pursuant to the Constitution of the State of Illinois, Art. II, par. 2, and the Constitution of the United States, Amendment 14, this petition for a Writ of Certiorari ought to be granted and the cause ought to be heard on its merits.

IV.

The Illinois Injunction Act vests in the aggrieved party against whom a temporary injunction wrongfully issues the right to recover his damages suffered in consequence. The taking away of such right by a state court is contrary to due process.

The Illinois Injunctions Act (Ill. Rev. Stat. 1947, Ch. 69, Section 12) as we pointed out under point I of this Argument, contemplates that a party aggrieved by the wrongful issuance of an injunction *shall be compensated* for his damages suffered because of such injunction. This right of recovery is a vested right and cannot be taken away from petitioners unless the Constitutional provisions as to due process are wholly disregarded.

The Constitution of the State of Illinois (Art. I, par. 2) follows the Constitution of the United States, Amendment 14, in declaring that "No person shall be deprived of life, liberty or property without due process of law."

The Illinois Injunctions Act, Sec. 12, says that when an injunction is wrongfully issued, when it is dissolved by *any court,* then the Chancellor "shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same." Ill. Rev. Stat. 1947, Ch. 69, Section 12.

The right to have the aggrieved party's damages assessed is a vested right, irrespective of such assessment by the Chancellor himself. If the Chancellor fails to assess such damages, the Statute gives the aggrieved party his relief nevertheless, because it provides that "a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

The judgment of the Supreme Court of Illinois now before this Court attempts to nullify the right of plaintiffs to recover their damages, and such attempt is contrary to due process.

V.

The Illinois Injunctions Act provides that before an injunction issues the complainant shall give bond. It further provides that where an injunction is dissolved, the Chancellor shall assess such damages as the nature of the case may require and to equity appertain. The denial by a state court, the right of the aggrieved party to recover his damages on any ground, is contrary to equity and to due process.

The Injunctions Act of Illinois as we heretofore quoted under point II of this Brief, makes an injunction bond mandatory before an injunction issues (Ill. Rev. Stat., Ch. 69, Sections 8, 9 and 11). The Act makes it clear that the purpose of such an injunction bond is to indemnify the aggrieved party and assure him that his damages will be assessed and paid to him in case it will be found in *any court* that the injunction was wrongfully issued.

The Injunctions Act of Illinois is not written for the purpose of permitting either the party who obtained the injunction or the court which reviews the injunction bond to escape the obligation as to damages by some sleight of hand. The Illinois Appellate Court, in its Opinion of June 13, 1955, and following it the Supreme Court in its

Opinion now before this Court, were looking not to the spirit of the law, but rather to the trick word "if". Both of these courts concluded that because of the wording of the injunction bond, respondent did not obligate itself to pay the damages if the same is assessed against it, but rather that it had the choice either to pay the assessed damages in the amount of $327,000, or to pay the sum of $1,000 set by the Chancellor as a cost bond, because respondent was a financially strong institution which was good for damages "in any amount." The Chancellor set this nominal sum in the bond for the reasons indicated even though counsel for respondent "did not want to quibble" and suggested a bond for $50,000 or $100,000. (A. 353; Record 3247-3259.) We submit that the holding of the Supreme Court of Illinois does violence to every concept underlying the phrase "due process." The Supreme Court of Illinois by its holding did exactly the thing that Justice Mathews (*Hurtado* v. *California*, 110 U.S. 516 (1884)) said due process forbids it to do.

VI.

When a temporary injunction issues and upon the defendant's standing on its motion to dismiss on constitutional grounds a final order is entered and the reviewing court reverses both orders and orders the complaint to be dismissed for want of equity, the basis of the injunction disappears and it is dissolved by operation of law and thereby the statutory right of the aggrieved party to recover his damages arises. The denial to recover such damages is contrary to equity and contrary to due process.

Under the Constitution of the State of Illinois and of the United States and in line with the intent and purport of the Illinois Injunctions Act (Ill. Rev. Stat. 1947, Ch. 69, Section 12) the decision of the Supreme Court of Illinois errs and errs grievously to the detriment of petitioners.

The instant proceedings which began on November 9, 1943 are in equity. We are not going to burden this Court by citing axiomatic rules of equity, but submit that the judgment of the Supreme Court of Illinois ought to be reviewed. It ought not to be permitted to stand because it proclaims an untenable rule of law. That rule says that notwithstanding all equity rules, and notwithstanding all pertinent provisions of the Illinois Statute, the petitioners have no remedy even though they were tied hand and foot for years by an injunction issued contrary to the Constitution.

Petitioners respectfully ask that this Court grant their petition and upon the hearing of this matter reverse the judgment of the Supreme Court of Illinois.

VII.

A bond given by a plaintiff in equity who is asking for a temporary injunction does so pursuant to the injunctions statute. The law at the time of the execution of the bond is a part of it; it is as much a part of the bond as if in TERMS INCORPORATED THEREIN. THE DISREGARD OF THE LAW AS IT IS INCORPORATED IN THE INJUNCTION STATUTE IS LACK OF DUE PROCESS.

In points I, V and VI, we argued the pertinency of the provisions of the Illinois Injunctions Act, Sections 8, 9 and 10 thereof, (Ill Rev. Stat. 1947, Ch. 69). It is too elementary to cite any cases in support of the proposition that the law at the time of an execution of a bond is a part of it. It is elementary to argue that the law is as much a part of the bond as if in terms incorporated therein. It was decided by reviewing courts, times without number, that where a bond is given under the authority of a statute in force when it is executed, in the absence of anything

appearing to show a definite intention to the contrary, it will be presumed that the intent of the party was to execute such a bond as the law required. *Ergo,* the Injunctions statute constitutes a part of the bond as if incorporated in it, and the bond must be construed in connection with the statute as it was held by the Supreme Court of Illinois in *Mix* v. *Vail*, 86 Ill. 40.

In the instant case the bond, even though the Chancellor termed it to be a cost bond, was given for the purpose of the Injunction Statute of Illinois, and that purpose is clearly written to be the indemnification of petitioners for damages if and when the injunction is found as having been wrongfully issued.

It requires no argument that the Chancellor setting the bond in a nominal amount did not and could not have said in advance that he limits the recovery, irrespective of the damages incurred, at the sum of $1,000. It is obvious that respondent did not and could not have said to the Chancellor that an injunction be issued, but at the same time the effect of the Injunctions Act be curtailed so that petitioners may not recover more than $1,000, even though their damages may be found to be many times that amount. Notwithstanding, the judgment of the Supreme Court of Illinois now before this Court does exactly what cannot be done under the law unless all meaning is taken from due process.

At the time when the Chancellor indicated that he will overrule petitioners' motion to dismiss the complaint on constitutional ground, and that he will grant respondent's motion for a temporary injunction, counsel for petitioners suggested that the injunction bond be not less than $2,000,000. (Ab. 69). The Chancellor retorted that re-

spondent was good for any amount of damages that petitioners might be able to establish if the injunction is found on appeal as having been wrongfully issued. (Ab. 69). When counsel for petitioners objected to a suggested nominal bond, even though respondent may be worth millions of dollars, the Chancellor expressed an opinion, or it may have been just an erroneous prognostication that petitioners were not going to be damaged because the bond is being set in a nominal amount (A. 69)

There is a very enlightening statement made by the Chancellor (A. 354) which he made after he warned counsel for petitioners that if he stands on his motion to dismiss that the court will enter a final order "to appeal from", and the Chancellor continued "then I would be very happy if you and Mr. Ball (at that time Chief Counsel for respondent) would get together in the meantime and decide on what the bond should be. It may be that they will be satisfied with a cost bond."

Mr. Heisler: "Very well."

The Court: "I am assuming from the manner in which you gentlemen get along so nicely, you are not going to have much trouble." (A. 354).

It appears that counsel for the parties appearing before the Chancellor were able to get along, because Chief Counsel for respondent stated that he doesn't want to quibble about the amount of the bond, and that he is agreeable for the Chancellor to fix a bond from $50,000 to $100,000 "*or whatever the Court feels to be a full and adequate protection.*" Notwithstanding the above, when counsel for the parties returned before the Chancellor and upon counsel for respondent inquiring to the Court: "Have you fixed in your mind the amount of the bond?", there was the following reply:

The Court: Yes, **cost bond** in order that this case may be determined once and for all, that will be $1,000."

Mr. Ball: Now, Mr. Heisler, do I now understand that you are now standing on your motion and permitting the injunction to become permanent?"

Mr. Heisler: I am not permitting anything. The Chancellor is going to act. I have no right to permit anything." (A. 355, R. 3282)

If the judgment of the Supreme Court of Illinois is permitted to stand, petitioners will be deprived of all reimbursement of damages that they suffered because of the wrongful injunction, notwithstanding that the Chancellor held that because of the riches of respondent, petitioners will be fully protected in case an injunctional order is to be found wanting in equity, as it was by the reviewing court.

The judgment of the Supreme Court of Illinois deprives petitioners of all damages even though respondent, speaking through its chief counsel before the Chancellor, was willing to have the injunction bond set from $50,000 to $100,000, "or whatever the Court feels to be a full and adequate protection."

Such a holding of the Supreme Court of Illinois is contrary to due process and ought not to be permitted to stand.

VIII.

The equitable purpose of an injunction bond is to indemnify the party who is restrained by the injunction for all damages that he may suffer because of the wrongful issuance of the injunction. The undertaking that complainant enters into is incorporated into a contract based on a valid consideration. An interpretation given by the state court that is contrary to such basic concept underlying the contract incorporated in the bond effectively impairs the obligation of the contract contrary to the Constitution of the State of Illinois and the Constitution of the United States.

There is no question that the intent of the Illinois Injunction Act (Ill. Rev. Stat. 1947, Ch. 69, Sec. 12) is to indemnify the party who is wrongfully restrained by an injunction for all damages that he may thereby suffer. The injunction bond, exacted from one seeking an injunction, is made by operation of law; it is a contract with the one who opposes the issuance of an injunction. In this contract is incorporated the statute pursuant to which the bond issues, as we have shown under point VII of this argument. To nullify such a contract as the judgment of the Illinois Supreme Court effectively does, is contrary to the Constitution both of the State of Illinois and of the United States.

The Illinois Constitution, Art. II, par. 14, forbids the making of law "impairing the obligation of contracts." The Constitution of the United States, Art. I, Sec. 10, Cl. 1, forbids the impairment of the obligation of contracts in the same words.

That the obligation undertaken by respondent when entering into the injunction bond is a contract, cannot be denied, if a fair and legal interpretation is given to the words and to the meaning thereof. That a contract exists

in this case ought to be found by this Court in accordance with its prior holding in *Dartmouth College* v. *Woodward*, 4 Wheaton, 518 (Feb. 2, 1819). As it was held in the *Dartmouth College* case, it ought to be found here "in this transaction every ingredient of a complete and legitimate contract is to be found." The points considered by this Court in the *Dartmouth College* case were: "(1) Is this contract protected by the Constitution of the United States? (2) Is it impaired by the acts under which the defendant holds?" This court answered those questions in the affirmative, and so it ought to hold here that respondent entered into a binding contract pursuant to its injunction bond and pursuant to the pertinent statute. It ought to find that this contract assured petitioners that they shall be paid the damages that will be assessed fairly and squarely as having been suffered by them because of the wrongful issuance of an injunction. This Court ought to find on the basis of the findings of the Illinois Appellate Court (330 Ill. App. 49) and that of the Supreme Court of Illinois (400 Ill. 38) that the injunction was wrongfully issued. It also ought to find that the judgment of the Supreme Court of Illinois, now before this Court on this petition, impairs the obligations of that contract and, therefore, this Court ought to grant this petition and reverse the judgment of the Supreme Court of Illinois.

This Court, in *Charles River Bridge* v. *Warren Bridge*, 11 Peters 420 (1837) adopted the rules of construction of a contract based on the express words thereof. Using that rule of construction the words of the Illinois Injunctions Act, and the injunction bond given by respondent pursuant thereto, clearly upholds petitioners' right to recover their damages. To hold otherwise would permit a situation to arise which Justice Story in his dissenting opinion

in the *Charles River Bridge* case said ought not to happen. Justice Story reminded us that:

> "It is a well known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor.... Why is this rule adopted? Plainly, because a grant is a contract and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration and then quibble as to the obscurities and implications of its own contract...."

We say with Justice Story that in the instant case, the meaning of the injunction bond drawn by the respondent ought to be construed most strongly against it. But even if we do not do so, an interpretation thereof in connection with the Injunctions Act of Illinois by any fair standards will uphold petitioners' claim.

We say with Justice Story that it would be to the dishonor of the Chancery Court of Illinois and particularly to the dishonor of respondent "that it should pocket a fair consideration and then quibble as to the obscurities and implications of its own contract...." Petitioners gave a fair consideration for the bond and that was that they were wrongfully restrained in their legitimate action as a union and union members, and for respondent to accept a fair consideration and then quibble as to the obscurities and implications of its own contract would do it dishonor.

The interpretation placed upon the injunction bond, by the Supreme Court of Illinois, in the judgment now before this Court, quibbles as to the obscurities (if any) and implications of the Injunctions Statute of Illinois. Such quibbling, in the words of Justice Story, does not do any honor to the State of Illinois that gave the statute

and the benefits, as well as obligation thereunder to petitioners as to all others in Illinois.

We submit that judgment of the Supreme Court of Illinois if permitted to stand will impair the obligations of a contract, and, therefore, the petition herein prayed ought to be granted and the judgment of the Supreme Court of Illinois ought to be reversed.

CONCLUSION.

Petitioners in this long drawn out proceedings, lasting better than 13 years, scrupulously abided by the law and by the interpretation thereof by the Illinois Courts. They did so even though they believed that the injunction issued against them was in violation of the Constitution of the State of Illinois and of the United States. They observed the law even when the wrongfully issued injunction threatened, nay, in fact destroyed the existence of the union.

Petitioners believed that placing themselves under the penumbra of the Constitution will protect them against all legal wrongs. They trusted in the interpretation of this Court as to the meaning of due process, and they are now asking that the instant case be judged by the selfsame interpretation often expressed by this Court.

This Court said:

> "Due process of law . . . conveyed neither formal nor fixed, nor narrow requirements. It is the compendius expression for all those rights which the courts must enforce because they are basic to our free society. . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. . . ."
>
> *Wolf* v. *Colorado*, 338 U.S. 25 (1949).

DARK P

We submit, for reasons hereinabove set forth, and for the reason that this Court has never spoken on the issues herein that this Court grant a Writ of Certiorari and upon hearing of the issues make its decision known.

Wherefore, petitioners pray that a Writ of Certiorari may issue out of and under the seal of this Court directed to the Supreme Court of Illinois, commanding that court to supply on a day certain to be therein named, a full and complete transcript of the record and of proceedings had in this case No. 33781 entitled on its docket *United Mail Order, Warehouse & Retail Employees Union, Local 20, etc., et al., Appellants,* v. *Montgomery Ward & Co., Inc., a corporation, Appellee,* to the end that this case may be reviewed and determined by this Court; that the said judgment of the Supreme Court of Illinois may be reversed by this Court, and that your petitioners may have such further and other relief in the premises as may seem just and proper.

Respectfully submitted,

FRANCIS HEISLER,
PEARL BAER,
Suite 1717
7 South Dearborn Street
Chicago, Illinois

CHARLES A. STEWART,
P. O. Box 3996
Carmel, California
Attorneys for Petitioners

FRANCIS HEISLER,
Of Counsel.

Chicago, Illinois,
December 12, 1956.

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APPENDIX A.

Opinion Supreme Court of Illinois.
United States of America

State of Illinois }
Supreme Court } ss.

At a Term of the Supreme Court, begun and held in Springfield on Monday, the fourteenth day of May in the year of our Lord, one thousand nine hundred and fifty-six, within and for State of Illinois.

Present: Harry H. Hershey, Chief Justice, Justice Joseph E. Daily, Justice Walter V. Schaefer, Justice George W. Bristow, Justice Ralph L. Maxwell, Justice Ray I. Klingbiel, Justice Charles H. Davis.

Latham Castle, Attorney General.

Robert G. Miley, Marshal.

Attest: Fae I. Searcy, Clerk *pro tempore.*

Be it Remembered, that afterwards, to-wit, on the 23rd day of May, 1956, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

United Mail Order, Warehouse & Retail Employees Union, Local 20, etc., *et al.*, etc., *Appellants.*	Appeal from Appellate Court First District.
No. 33781 *vs.*	
Montgomery Ward & Co., Incorporated, a corporation, *Appellee.*	

Docket No. 33781—Agenda 15—March, 1955.

United Mail Order, Warehouse & Retail Employees Union, Local 20, *et al.*, Appellants, v. Montgomery Ward & Co., Appellee.

Mr. JUSTICE BRISTOW delivered the opinion of the court:

The plaintiffs-appellants, hereinafter referred to as the Union, filed a first class suit in contract in the municipal court of Chicago against the defendant-appellee, hereinafter referred to as Wards, on a $1000 injunction bond theretofore filed by Wards in the superior court of Cook County, to recover alleged damages suffered by the Union. The Union recovered judgment against Wards in the trial court in the sum of $327,000. Wards appealed such decision to the Appellate Court for the First District, which court reversed the judgment of the trial court, and this court thereafter granted leave to appeal, on petition duly filed, after overruling Ward's motion to dismiss such petition for leave to appeal for want of jurisdiction in this court.

On November 9, 1943, Wards filed in the superior court of Cook County its complaint in equity against the Union, praying for a temporary and permanent injunction against continued publication of libelous statements and asking for monetary damages in the amount of $1,000,000 for past libels. The Union in such suit filed a motion to strike Ward's complaint and dismiss the suit, and Wards moved for a preliminary injunction. On June 25, 1945, the superior court of Cook County entered an order denying the Union's motion to dismiss the action, and on the same date granted Ward's motion for a preliminary injunction to be effective upon the court's approval of an injunction bond, and to remain in effect until further order of court.

On June 26, 1945, the injunction bond sued upon in the instant proceeding in the amount of $1000 was filed and approved and, insofar as pertinent to the decision of this case, provided as follows:

"Know all Men by These Presents,

"That we, Montgomery Ward & Co., Incorporated, as principal, and Seaboard Surety Company, as surety, of the County of Cook and State of Illinois, are held and firmly bound unto [the defendants in the injunction suit], in the sum of One Thousand and no/100ths Dollars ($1,000.00) to be paid to the said Defendants, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

"Sealed with our Seals, and dated this 26th day of June, A.D. 1945.

"Whereas, the above bounden Montgomery Ward & Co., Incorporated has filed its bill of complaint in the Superior Court of Cook County and State of Illinois against the above named defendants praying, among other things, for an injunction to restrain the above named defendants from * * * [Here are set forth the terms of the temporary injunction.]

"And whereas said Court has allowed an injunction for that purpose according to the prayer of said bill, upon the said Montgomery Ward & Co., Incorporated giving bond and security as provided by law:

"Now, therefore, the condition of the above obligation is such that if the above bounden Montgomery Ward & Co., Incorporated, and Seaboard Surety Company, their executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid to the said Defendants, their executors, administrators, or assigns, all damages which may be sustained by the said defendants, or any one or more of them by reason of the wrongful issuing of such injunction, and also, all such costs and damages as shall be awarded against the said complainant, Montgomery Ward & Co., Incorporated, in case the said injunction shall be dissolved; then, the above obligation to be void; otherwise to be and remain in full force and virtue."

On July 6, 1945, the Union filed a motion to vacate and set aside the order of June 25, 1945, denying their motion to dismiss the action and granting Ward's motion for preliminary injunction. This Union motion was denied, and, upon the Union refusing to plead further and announcing that they would stand on their motion to strike the complaint and dismiss the action, the superior court of Cook County on July 6, 1945, entered a final order as follows:

"FINAL ORDER

"It is hereby ORDERED AND DECREED that the Motion of the above-named defendants to vacate and set aside the Order entered on June 25, 1945 be and the same is hereby denied. And it is further

"ORDERED AND DECREED that the above-named defendants having elected to stand on their Motion to Strike the complaint and to dismiss the suit, therefore Order of June 25, 1945 is made a final order."

The Union appealed from such final order of the superior court of Cook County and the Appellate Court, in an opinion reported in 330 Ill. App. 49, reversed the trial court with directions to dismiss the complaint for want of equity. Thereafter Wards appealed to this court, which affirmed the Appellate Court on March 18, 1948, in an opinion reported in 400 Ill. 38.

On June 1, 1948, the Union filed in the superior court of Cook County a suggestion of damages under section 12 of the Injunction Act, (Ill. Rev. Stat. 1947, chap. 69, par. 12,) claiming damages of $453,750 allegedly incurred by reason of the temporary injunction and Wards' claim for damages. Thereafter Wards filed its motion to strike the suggestion of damages on the grounds, among others, that the temporary injunction had not been dissolved but had merged in the final order and had become *functus officio*, and that the alleged damages did not arise by reason of the temporary injunction. Thereafter the Union

filed a motion to dissolve the temporary injunction, and on June 22, 1948, the superior court granted Wards' motion to strike and dismiss the suggestion of damages, ordered such suggestion of damages dismissed, and denied the Union's motion to dissolve the temporary injunction. No appeal was taken from this order.

On April 25, 1950, the Union filed in the superior court of Cook County its second petition for suggestion of damages under section 12 of the Injunction Act which they claim to have suffered by reason of the alleged wrongful issuance of the temporary injunction, the amount of the claimed damages being increased to $730,000. Wards filed its motion to strike and dismiss the Union's second petition for damages upon the same grounds as its motion to dismiss the initial petition and on the additional ground that the prior order dismissing the Union's suggestion of damages was a final order which had previously adjudicated all of the matters presented in the second petition. Ward's motion to strike and dismiss the Union's second petition was granted and such petition dismissed. On appeal by the Union to the Appellate Court the trial court's order of dismissal of said second petition was affirmed in an opinion reported in 348 Ill. App. 198, and this court denied the Union's petition for leave to appeal from such Appellate Court decision on March 11, 1953. 414 Ill. 629, 351 Ill. App. XIV.

On March 21, 1953, the Union filed the present contract action for damages on the $1000 injunction bond heretofore set forth, as a first class action in the municipal court of Chicago. In this action they claimed the same damages as those alleged in the petitions filed in the superior court in 1948 and 1950, and, in addition, $70,000 to cover attorney's fees and court costs. Wards' motion to strike and dismiss the statement of claim was denied. Upon Wards answering, the trial of the cause was had

before the court without a jury and resulted in judgment for the Union and against Wards in the sum of $327,000, together with costs of the Union, such judgment including $77,000 attorneys' fees. Upon appeal to the Appellate Court for the First District by Wards the trial court judgment was reversed and the cause remanded in an opinion reported in 6 Ill. App. 2d 477. Thereafter, on motion of the Union, the Appellate Court on June 27, 1955, amended its judgment by striking therefrom the remandment order, making its judgment final in compliance with section 75 of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75,) and thereafter leave to appeal was granted the Union by this court.

The Union assigns four propositions as error for reversal of the Appellate Court decision, as follows:

1. The stated penalty in an injunction bond does not limit the amount of damages recoverable in an action on the bond by the principal therein.

2. The temporary injunction of June 25, 1945, did not become *functus officio* by reason of the final order of July 6, 1945, in the original suit and such final order did not turn the temporary injunction into a permanent injunction.

3. The Union is not barred from suing Wards on Wards' injunction bond as an unincorporated association.

4. The trial court entered a separate and distinct judgment for attorneys' fees in this case and the Appellate Court erred in ignoring the question of attorneys' fees.

Wards in their brief assign as cross error, and as reasons the Appellate Court decision should be affirmed, the following:

1. Both the trial and Appellate courts erred in finding that the condition of the bond sued on had been breached.

2. The trial court erred in finding that the Union could recover damages for having been enjoined from performing acts which would have been tortious if committed.

3. The trial court's order denying Wards' motion for judgment at the close of all the evidence is contrary to the evidence and

4. The trial court erred in excluding certain of Wards' exhibits.

Although Wards again argues in its brief its motion to dismiss the Union's petition for leave to appeal for want of jurisdiction in this court, the same has heretofore been fully considered by this court, passed upon adversely to Wards, and will not be again considered.

The principal contention considered in the briefs and in the Appellate Court opinion is whether or not the Union, as principal, can recover damages in excess of $1000, the penal sum named in the bond, from Wards in an action on the bond. The substance of the Union's contention in this respect is that the conditions stated in the bond, on the occurrence of which the principal obligation of the bond would be void, constitute convenants between the principal obligee and the obligors, and that the principal obligee has an option to bring either an action of debt for the amount of the penalty named in the bond or an action of covenant for the damages which the obligor has contracted to pay regardless of the stated penalty of the bond.

The case relied upon by the Union as establishing such a proposition as Illinois law is *Kohlsaat* v. *Crate*, 144 Ill. 14. In the *Kohlsaat case* a temporary injunction had been granted on the filing of an injunction bond in the penal sum of $500. Thereafter the temporary injunction was dissolved on motion and the defendant was given leave to file suggestions of damages. Such suggestions were filed and a hearing had thereon in which it was found that damages totalling $2227 had been incurred. The trial court held that the liability of the plaintiff to the defend-

ant on account of damages sustained by reason of wrongfully suing out the injunction was limited to the amount of the penalty of $500 stated in the injunction bond. The Appellate Court reversed and remanded the trial court's decree, with directions to enter a decree awarding the defendant his total damages, which was affirmed on appeal to this court.

This court in its opinion in the *Kohlsaat case* observed that the action was brought for assessment of damages under section 12 of the Injunction Act, which was then in effect and at the present time is in effect, being Ill. Rev. Stat. 1955, chap. 69, par. 12, and provides as follows:

"In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

Although the Kohlsaat case announces and establishes the correct principle of Illinois law as to recovery of damages for the wrongful issuance of a temporary injunction under section 12 of the Illinois Injunction Act, it must be remembered that the present proceeding is an action in contract by the Union on the penal bond itself against Wards and is not a proceeding under section 12 of the Illinois Injunction Act. In the *Kohlsatt case* we gave no consideration to the question and the case cannot be considered as authority as to what limitations, if any, there are to the amount of recovery in an action on a penal bond.

As heretofore noted, this is a contract action and there is an elementary principle of contract law, for which no authority needs to be cited, that Wards' liability on such contract is limited to its doing what the contract obligates it to do.

In considering the question here presented and the authorities in reference thereto it must be kept in mind that in general there are two types of bond obligations. First, there is a common defeasance bond in which the obligor agrees to pay a stipulated amount called a penalty, subject to a condition of defeasance that voids the covenant to pay the specified amount if the condition occurs. The only covenant or promise to pay by the obligor in such bonds is to pay the penalty if the condition is not fulfilled. Such common defeasance bonds are sometimes otherwise known as penal bonds, being "a bond conditioned upon the forfeiture of a penalty for its breach." (Ballantine Law Dictionary (1930) page 948; Black's Law Dictionary, 4th ed. 1951.) Typical of this type of bond is the one here sued upon.

Another type of bond is that which contains within the contract, first, an express covenant or promise by the obligor to do or refrain from doing a particular act, the performance of which express covenant or promise is further secured in the same instrument by a second agreement to pay a penalty if the first covenant is not performed. At common law the obligee under the second type of bond had the option of suing either for the damages which resulted from the breach of the principal covenant or promise to do or refrain from doing a particular act, or to sue for the penalty provided by the secondary agreement as security for the performance of the primary obligation.

The *Kohlsatt case* above referred to is typical of a third type of case which involves claims based upon some obligation or duty imposed otherwise than by the undertaking

in the bond and entirely collateral to the terms of the bond and the undertakings therein assumed.

In *Freeman* v. *People*, 54 Ill. 153, an action of debt was brought upon a bastardy bond in the penal sum of $500 and judgment was entered in favor of the plaintiff for $517.50. In reversing the trial court we noted that in actions upon penal bonds the practice has been long and well settled that if the plaintiff recover it must be for the amount of the penalty as debt and such sum as may be found as damages and held that the obligors can in no event be held liable on the bond for more than the penalty, that being the extent of their undertaking, and that the obligee cannot recover damages beyond that sum, whatever be the amount of damages sustained.

In *Kerz* v. *Wolf*, 131 Ill. App. 387, in an action of debt on an injunction bond in the penal amount of $500 for the full amount of the penalty the trial court instructed the jury to find and assess the plaintiff's damages at such sum not exceeding $500. Damages in excess of the face amount of the bond had been proved but the Appellate Court approved the instruction limiting the recovery to the face of the bond, noting that the verdict given of $500 was the limit of a possible recovery in an action on the bond.

The overwhelming weight of authority in other jurisdictions is likewise to the effect that nothing beyond the sum designated in the bond as a penalty may be recovered even against the principal in an action on the bond. *Cimiotti Unhairing Co.* v. *American Fur Ref. Co.*, 168 Fed. 529; *United Motors Service* v. *Tropic-Aire*, 57 Fed. 2d 479; *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 147 Fed. 2d 246; *Asevado* v. *Orr*, 100 Cal. 293, 34 Pac. 777; *Strong* v. *Duff*, 228 Ky. 615, 15 S.W. 2d 517; *Graff* v. *Epstein*, 238 Mich. 227, 213 N.W. 190; 28 Am. Jur., "Injunctions," sec. 342 *et seq.*, page 516 *et seq.*

In each case of the Illinois cases referred to by the Union in which suit was on a defeasance bond recovery has been limited to or within the penalty of the bond.

All of the cases cited by the Union allowing recovery in excess of the amount of penalty stated in a bond were cases involving contracts containing an express covenant by the obligors to do or refrain from doing a particular act, the performance of which covenant or promise is secured by an agreement or bond to pay a specific amount in the event the first promise is not performed. In such cases the plaintiff is allowed to recover more than the amount of the penalty by suing on the promise to perform rather than on the promise to pay the penalty.

No such promise exists in the present case. The bond sued on in the present case contains only one promise by Wards and that is the payment of $1000 upon the breach of a given condition. The Appellate Court correctly held that Wards' liability in the contract action by the Union on the injunction bond was limited by the extent of its promise and could not in any case exceed $1000.

The question remains as to what damages, if any, the Union is entitled to for issuance of the temporary injunction, within the limits of the penalty of the bond, inasmuch as section 12 of the Injunction Act specifically provides that a failure to assess damages thereunder does not operate as a bar to an action upon the bond.

The decision of this court in the case of *Town of Ottawa* v. *Walker*, 21 Ill. 605, does not resolve this question. In that case a decree was entered making a temporary injunction perpetual after a motion to dissolve the injunction was overruled, but in such case the plaintiffs took no rule on the defendants for an answer, the defendants were not put in default, the bill was not taken as confessed, and no answer or demurrer was filed. We there held that the mere motion of defendant to dissolve the

temporary injunction did not authorize the court on overruling the motion to make the injunction perpetual but that the defendant still had the right to be heard on the merits and the court could render a decree making the injunction perpetual only on a bill *pro confesso*, on overruling a demurrer to the bill, or upon a hearing on the merits.

In the instant case the final order making the temporary injunction perpetual was entered not only after the motion of the Union to dissolve was overruled but after the Union had elected to stand on its motion to dismiss the complaint for want of equity, which was equivalent to a demurrer at common law, and refused to plead further. Therefore the trial court, from a procedural point of view, properly entered its final order making the temporary injunction permanent, that being the then existing law of the case, even though upon appeal through the Appellate Court to this court it was fully determined that the trial court was in error as to the right of Wards to a permanent injunction.

The question of assessment of damages under section 12 of the Injunction Act was thoroughly considered and reviewed by this court in its recent decision in *Schien* v. *City of Virden*, 5 Ill. 2d 494, and what was there said is controlling in this case. In that case the trial court after a hearing on the merits found the equities in favor of the defendants, dissolved a temporary injunction which had been issued, dismissed the complaint for want of equity and awarded the defendants' attorneys' fees as damages under section 12 of the Injunction Act. The plaintiff upon appeal among other things contended that the temporary injunction was never dissolved and therefore no damages were assessable. We there held that, the trial court having denied the defendants' motion to dissolve the temporary injunction, that order, not having been appealed from,

therefore became a final judgment and the temporary injunction was properly issued. Not having been wrongfully issued and not having been dissolved prior to the hearing on the merits of the case, damages therefor were not assessable under section 12 of the Injunction Act. In support of such conclusion we cited the decision of this court in *Montgomery Ward & Co.* v. *Department Store Employees*, 348 Ill. App. 198.

When the Union elected to stand on its motion to strike the original complaint and to dismiss the suit for want of equity rather than appeal from the interlocutory order denying their motion to vacate and set aside the temporary injunction, the decision of the trial court was given on the merits of the controversy and on the question whether a permanent injunction should issue under the facts alleged in the complaint and admitted by the Union's motion to dismiss. Upon the entry of such final order the temporary injunction previously issued was not dissolved but merged in the permanent injunction.

Since the temporary injunction in this case was not dissolved before a determination on the merits, and since it merged with the permanent injunction issued by the trial court, damages were not assessable under section 12 of the Injunction Act and, in fact, were denied. *Montgomery Ward & Co.* v. *Department Store Employees*, 348 Ill. App. 198.

In order to recover on the bond here in issue the Union was required to establish the breach of conditions of the bond, that is, the Union had to show that the temporary injunction had been wrongfully issued and that it was dissolved. Since the record affirmatively shows that the temporary injunction was not dissolved prior to the entry of final order on the merits of the case but was merged therein, the Union failed to establish any breach of condition of the bond or any right to recover thereon.

Accordingly the judgment of the Appellate Court as amended, reversing the judgment of the municipal court, was correct.

From what has heretofore been said it is unnecessary to consider other errors or cross errors assigned in this case.

The judgment of the Appellate Court as amended is affirmed.

Judgment affirmed.

APPENDIX B.

STATE OF ILLINOIS

Office Of

CLERK OF THE SUPREME COURT

Springfield

Mrs. Earle Benjamin Searcy, Clerk Telephone 8-6435

September 24, 1956

Mr. Urban A. Lavery
Attorney at Law
7 S. Dearborn Street
Chicago 3, Illinois

Dear Sir:

In Supreme Court today, in case No. 33781 entitled United Mail Order, Warehouse & Retail Employees Union, Local 20, etc., et al., etc., appellants,

vs.

Montgomery Ward & Co., Incorporated, a corporation, appellee.

Petition for Rehearing was: DENIED.

Opinion modified on pages 4, 8, and 9 upon denial of petition for rehearing, a copy of each page being enclosed.

Very truly yours,
Fae I. Searcy
Clerk pro tempore

No. 33781—Opinion modified on page 4, 8 and 9 upon denial of petition for rehearing September 24, 1956.

$77,000 attorneys' fees. Upon appeal to the Appellate Court for the First District by Wards the trial court judgment was reversed and the cause remanded in an opinion reported in 6 Ill. App. 2d 477. Thereafter, on motion of the Union, the Appellate Court on June 27, 1955, amended its judgment by striking therefrom the remandment order, making its judgment final in compliance with section 75 of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75,) and thereafter leave to appeal was granted the Union by this court.

The Union assigns four propositions as error for reversal of the Appellate Court decision, as follows:

1. The stated penalty in an injunction bond does not limit the amount of damages recoverable in an action on the bond against the principal therein.

2. The temporary injunction of June 25, 1945, did not become *functus officio* by reason of the final order of July 6, 1945, in the original suit and such final order did not turn the temporary injunction into a permanent injunction.

3. The Union is not barred from suing Wards on Wards' injunction bond as an unincorporated association.

4. The trial court entered a separate and distinct judgment for attorneys' fees in this case and the Appellate Court erred in ignoring the question of attorneys' fees.

Wards in their brief assign as cross error, and as reasons the Appellate Court decision should be affirmed, the following:

1. Both the trial and Appellate courts erred in finding that the condition of the bond sued on had been breached.

2. The trial court erred in finding that the Union could recover damages for having been enjoined from performing acts which would have been tortious if committed.

3. The trial court's order denying Wards' motion for judgment at the close of all the evidence is contrary to the evidence and

4. The trial court erred in excluding certain of Wards' exhibits.

Although Wards again argues in its brief its motion to dismiss the Union's petition for leave to appeal for want of jurisdiction in this court, the same has heretofore been fully considered by this court, passed upon adversely to Wards, and will not be again considered.

The principal contention considered in the briefs and in the Appellate Court opinion is whether or not the Union can recover damages in excess of $1000, the

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than on the promise to pay the penalty.

No such promise exists in the present case. The bond sued on in the present case contains only one promise by Wards and that is the payment of $1000 upon the breach of a given condition. The Appellate Court correctly held that Wards' liability in the contract action by the Union on the injunction bond was limited by the extent of its promise and could not in any case exceed $1000.

The question remains as to what damages, if any, the Union is entitled to for issuance of the temporary injunction, within the limits of the penalty of the bond, inasmuch as section 12 of the Injunction Act specifically provides that a failure to assess damages thereunder does not operate as a bar to an action upon the band.

The decision of this court in the case of *Town of Ottawa* v. *Walker*, 21 Ill. 605, does not resolve this question. In that case a decree was entered making a temporary injunction perpetual after a motion to dissolve the injunction

was overruled, but in such case the plaintiffs took no rule on the defendants for an answer, the defendants were not put in default, the bill was not taken as confessed, and no answer or demurrer was filed. We there held that the mere motion of defendant to dissolve the temporary injunction did not authorize the court on overruling the motion to make the injunction perpetual but that the defendant still had the right to be heard on the merits and the court could render a decree making the injunction perpetual only on a bill *pro confesso*, on overruling a demurrer to the bill, or upon a hearing on the merits.

In the instant case the final order making the temporary injunction perpetual was entered not only after the motion of the Union to dissolve was overruled but after the Union had elected to stand on its motion to dismiss the complaint for want of equity, which was equivalent to a demurrer at common law, and refused to plead further. Therefore the trial court, from a procedural point of view, properly entered its final order making the temporary injunction permanent, even though upon appeal through the Appellate Court to this court it was finally determined that the trial court was in error as to the right of Wards to a permanent injunction.

The question of assessment of damages under section 12 of the Injunction Act was thoroughly considered and reviewed by this court in its recent decision in *Schien* v. *City*

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of Virden, 5 Ill. 2d 494, and what was there said is controlling in this case. In that case the trial court after a hearing on the merits found the equities in favor of the defendants, dissolved a temporary injunction which had been issued, dismissed the complaint for want of equity and awarded the defendants' attorneys' fees as damages under section 12 of the Injunction Act. The plaintiff upon

appeal among other things contended that the temporary injunction was never dissolved and therefore no damages were assessable. We there held that, the trial court having denied the defendants' motion to dissolve the temporary injunction, that order, not having been appealed from, therefore became a final judgment and the temporary injunction was properly issued. Not having been wrongfully issued and not having been dissolved prior to the hearing on the merits of the case, damages therefor were not assessable under section 12 of the Injunction Act.

When the Union elected to stand on its motion to strike the original complaint and to dismiss the suit for want of equity rather than appeal from the interlocutory order denying their motion to vacate and set aside the temporary injunction, the decision of the trial court was given on the merits of the controversy and on the question whether a permanent injunction should issue under the facts alleged in the complaint and admitted by the Union's motion to dismiss. Upon the entry of such final order the temporary injunction previously issued was not dissolved but merged in the permanent injunction.

Since the temporary injunction in this case was not dissolved before a determination on the merits, and since it merged with the permanent injunction issued by the trial court, damages were not assessable under section 12 of the Injunction Act and, in fact, were denied. *Montgomery Ward & Co.* v. *Department Store Employees*, 348 Ill. App. 198.

In order to recover on the bond here in issue the Union was required to establish the breach of conditions of the bond, that is, the Union had to show that the temporary injunction had been wrongfully issued and that it was dissolved. Since the record affirmatively shows that the tem-